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Dato' Ramesh a/l Rajaratnam v Datin Zaleha bt Abd Rahman & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-161–09 OF 2013
AZAHAR MOHAMED, MOHAMAD ARIFF AND HAMID SULTAN JJCA
3 JUNE 2014

Succession — Administration — Locus standi — Whether administrators of deceased's estate who had yet to extract grant of letters of administration had locus to file bankruptcy notice on behalf of estate — Whether principle well established that administrator could not maintain legal proceedings without sealed grant of administration — Whether exception to general rule only allowed for limited purpose of 'protecting and preserving estate's assets' — Decision of Federal Court in Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297 — Whether filing of bankruptcy notice did not fall within that exception

The issue in the instant appeal was whether the respondents, who were the administrators of a deceased's estate but who had yet to extract the grant of letters of administration, had locus standi to file a bankruptcy notice ('BN') on behalf of the estate against the appellant. The appellant contended that the respondents did not have the locus to do so but he failed on that ground to set aside the BN before the registrar. The High Court upheld the registrar's decision resulting in the instant appeal. Although the principle that an administrator of a deceased's estate had no title to sue on behalf of the estate unless he had extracted the grant of letters of administration was well entrenched since the decision in *Ingall v Moran* [1922] 1 KB 160 and had been applied in numerous cases in Malaysia, the Federal Court in *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297 ('Al Rashidy') held that the particular facts in that case constituted 'special circumstances' entitling the beneficiaries of a deceased's estate who had yet to extract the grant of administration to sue for recovery of land belonging to the estate which a third party had allegedly fraudulently transferred to himself and the land was in danger of being forever lost to the estate. The Federal Court held the beneficiaries had locus standi to sue 'at least for the limited purpose of protecting and preserving the estate's assets'.

Held, allowing the appeal with cost of RM15,000 and setting aside the BN:

(1) The test in administration proceedings for locus standi (to sue before extract of grant of letters of administration) must be at least for the purpose of protecting and preserving the estate's assets. The Court did

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not see how the instituting of bankruptcy proceedings against a purported debtor of the estate would fall within that restrictive test. A bankruptcy proceeding could not be said to be for the purpose of protecting and preserving the assets of a deceased's estate (see para 14).

(2) Malaysian courts have repeatedly recognised the rule that an administrator must have the sealed order of the High Court before getting entangled in any proceedings in court. In the present case it was not clear if the respondents had, before getting the BN issued, demonstrated to the court that they had locus standi. The facts of the instant case had no resemblance to the facts in *Al Rashidy* to attract the 'special circumstances' concept set out in that case (see paras 11(c) & 12–13).

(3) The Bankruptcy Act 1967 only gave locus standi to a creditor and not to an administrator who had not extracted the sealed order (of grant of letters of administration) unless the issue of locus standi had been condoned by order of court. Bankruptcy proceedings were quasi-penal proceedings and the strict letter of the law had to be followed in order not to breach art 5(1) of the Federal Constitution which stated that no person shall be deprived of his life or personal liberty save in accordance with law (see para 15).

[Bahasa Malaysia summary

Isu di dalam kes rayuan adalah sama ada responden, pentadbir harta pusaka si mati tetapi masih belum mendapatkan pemberian surat kuasa mentadbir, mempunyai locus standi untuk memfailkan notis kebankrapan ('NK') bagi pihak estet terhadap perayu. Perayu berhujah bahawa responden tidak mempunyai locus untuk berbuat demikian tetapi dia gagal untuk mengetepikan NK sebelum pendaftar. Mahkamah Tinggi mengekalkan keputusan pendaftar menyebabkan rayuan ini. Walaupun prinsip bahawa seorang pentadbir harta pusaka si mati tidak mempunyai kuasa untuk mendakwa bagi pihak harta itu melainkan jika dia telah mengekstrak pemberian surat kuasa mentadbir yang telah berakar-umbi sejak keputusan dalam kes *Ingall v Moran* [1922] KB 160 dan telah digunakan dalam banyak kes di Malaysia, Mahkamah Persekutuan dalam kes *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297 ('Al Rashidy') memutuskan bahawa fakta-fakta yang tertentu dalam hal yang membentuk 'keadaan khas' yang melayakkan waris harta pusaka si mati yang belum mendapatkan pemberian pentadbiran untuk mendakwa bagi mendapatkan kembali tanah milik estet yang mana pihak ketiga telah dikatakan menipu memindahkan kepada dirinya sendiri dan tanah itu adalah dalam bahaya yang selama-lamanya terlepas kepada estet. Mahkamah Persekutuan memutuskan benefisiari mempunyai locus standi untuk mendakwa 'at least for the limited purpose of protecting and preserving the estate's assets'.

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Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000 dan mengetepikan NK:

(1) Ujian dalam prosiding pentadbiran untuk locus standi (untuk mendakwa sebelum mengekstrak pemberian surat kuasa pentadbiran) mestilah sekurang-kurangnya bagi maksud melindungi dan memelihara aset harta pusaka ini. Mahkamah tidak melihat bagaimana memulakan prosiding kebankrapan terhadap penghutang harta pusaka itu akan terangkan dalam maksud ujian yang ketat. Suatu prosiding kebankrapan tidak boleh dikatakan bagi maksud melindungi dan memelihara aset harta si mati (lihat perenggan 14).

(2) Mahkamah Malaysia telah berulang kali mengiktiraf peraturan bahawa pentadbir mesti mempunyai perintah yang dimeterai di Mahkamah Tinggi sebelum menjadi terikat dengan apa-apa prosiding di mahkamah. Dalam kes ini ia tidak jelas jika responden telah, sebelum mendapatkan NK dikeluarkan, menunjukkan kepada mahkamah bahawa mereka mempunyai locus standi. Fakta kes ini tidak mempunyai persamaan dengan fakta dalam kes *Al Rashidy* untuk menarik konsep 'keadaan khas' yang dinyatakan dalam kes (lihat perenggan 11(c) & 12–13).

(3) Akta Kebankrapan 1967 hanya memberikan locus standi kepada pemiutang dan tidak kepada seorang pentadbir yang tidak mengekstrak perintah yang dimeterai (pemberian surat kuasa mentadbir) melainkan isu locus standi telah dibenarkan dengan perintah mahkamah. Prosiding kebankrapan adalah prosiding quasi-penal dan perkataan undang-undang yang ketat perlu diikuti agar tidak melanggar perkara 5(1) Perlembagaan Persekutuan yang menyatakan bahawa tiada seorang pun yang boleh diambil nyawanya atau dilucutkan kebebasan dirinya kecuali mengikut undang-undang (lihat perenggan 15).]

Notes

For cases on locus standi, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2198–2200.

Cases referred to

Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297; [2007] 3 CLJ 361, FC (distd)

Ang Hoi Yin v Sim Sie Hau [1969] 2 MLJ 3; [1968] 1 LNS 7 (refd)

Chong Ah Guan & Anor v Amanah Merchant Bank Bhd & Ors [1993] MLJU 121; [1993] 1 LNS 17, HC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188; [1997] 4 CLJ 393, FC (refd)

Ingall v Moran [1944] KB 160, CA (refd)

Jayasena v R [1970] AC 618, PC (refd)

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Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (not folld)
Ooi Jim & Anor v Ai Eit & Ors [1977] 2 MLJ 105; [1974] 1 LNS 108 (refd)
P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors [1961] 1 MLJ 89; [1961] 1 LNS 78 (refd)
Selvarajah & Anor v Official Administrator & Anor [1978] 2 MLJ 108 (refd)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32, HC (refd)
Wong Moy (administrators of the estate of Theng Chee Kim, deceased) v Soo Ah Choy [1996] 3 SLR 398, CA (refd)

Legislation referred to

Bankruptcy Act 1967
Federal Constitution art 5(1)
Probate and Administration Act 1959 s 39, 39(1)
Rules of Court 2012 O 15 r 6a

Appeal from: Bankruptcy No 29–5017–09 of 2012 (High Court, Kuala Lumpur)

C Paul Aisu (Sandosh Anandan with him) (Sandosh Anandan) for the appellant.
Allan Wong (Alex Lim with him) (Zain Megat & Murat) for the respondent.

Hamid Sultan JCA(delivering judgment of the court):

[1] The appellant ('the judgment debtor') appealed against the decision of the High Court which did not allow the appellant's appeal against the decision of the senior assistant registrar ('the SAR') who refused to set aside the bankruptcy notice on the ground that when the bankruptcy notice was issued by the respondent as administrators of the deceased estate, the letters of administration were not extracted.

[2] The strict rule is that the letters of administration must be issued by the High Court to the administrator and/or administratrix before any action can be taken for the benefit of the estate (see *Janab's Key To Civil Procedure,* (5th Ed), pp 143–144). Some limited exceptions are found in O 15 r 6a of the Rules of Court 2012 ('the RC'). In *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3; [1968] 1 LNS 7, the plaintiff's administratrix brought an action against the defendant without having extracted the letters of administration even though it had been granted by the court. The defendant entered a conditional appearance and applied to the court to set aside the writ on the ground that the plaintiff had not acquired the locus standi yet. The court held that since the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and therefore the suit was a nullity and must be set aside. The strict rule recently had been whittled down by the Federal Court to say if there are 'special circumstances' the administrator will have locus to

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proceed with the legal proceedings (see *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361). This is notwithstanding the strict provision of s 39(1) of the Probate and Administration Act 1959 which states:

> 39(1) Where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Corporation in the same manner and to the same extent as it vests in the Probate Judge in England.

[3] It must be noted that the 'corporation' under s 39 means 'official administrator'. By virtue of s 39, the law vests the right to sue and be sued to the 'official administrator'. If anybody intermeddles with the estate of the deceased, the 'official administrator' can be requested to take action. If he fails the interested parties can sue the 'de son tort' and also name the 'official administrator' as one of the defendants to obtain appropriate orders against the 'de son tort' in the presence the 'official administrator' though the 'official administrator' cannot be sued for the liability of the estate, etc (see *Selvarajah & Anor v Official Administrator & Anor* [1978] 2 MLJ 108). The Federal Court's decision of *Al Rashidy* did not at all discuss the section when by judicial fiat it had created exception to well established principles of *Ingall v Moran* followed in Malaysia. In any event this court is bound by the decision of the Federal Court notwithstanding the exception to the rule that is against the intent and spirit of the statute (see *Jayasena v R* [1970] AC 618; *Ingall v Moran* [1944] KB 160).

[4] When 'special circumstances' are relied on the burden will be on the purported administrator to demonstrate on the issue of locus standi in the proceedings or by way of affidavits as the case may be before obtaining any orders from the court. In essence, those who rely on special circumstances do not per se have a legal right such as administrator lawfully appointed by the court, with the sealed order extracted.

[5] In light of Al Rashidy's case the courts will not ordinarily grant locus unless it can be shown that it was necessary and expedient to protect and preserve the interest of the deceased estate. In view of the statute which deals with probate and administration of estates, the threshold for the purported administrator is very high to satisfy the locus standi test. It all depends on the facts, circumstances, urgency of the matter, etc. The reason why letters of administration must be obtained before commencement of the action for the benefit of estate is well established and the jurisprudence need not be set out here. However, now the Rules of Court provides limited orders to be granted for the estate to be represented in an action or pending action as the court may think fit.

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BRIEF FACTS

[6] The learned High Court judge had written a 17 pages judgment setting out the facts in detail. We do not wish to labour on what has been said save to deal with the core issues.

[7] The respondents are the administrators of the deceased, Shahrani bin Abdullah. It is not in dispute that the appellant has filed an action against the deceased while he was alive. Subsequent to the action, the appellant had garnished the money of the deceased amounting to RM2,026,536.38. The issue of garnishment was appealed to the Court of Appeal. The Court of Appeal had ordered the appellant to repay the money. The appellant is seeking leave to appeal against the said order to the Federal Court. Subsequent to the order, the appellant had obtained a stay of all proceedings in the High Court from the Court of Appeal before a different corum. Before us the appellant argues that the first order of the Court of Appeal was stayed. The respondent says only the matters in the High Court were stayed and not the first Court of Appeal order or the bankruptcy action, which is a different action relating to recovery only.

[8] In essence there is prima facie a dispute as to whether the first order of the Court of Appeal was stayed more so when the second order of the Court of Appeal was sought by the appellant they have specifically asked for the first order of the Court of Appeal to be stayed.

[9] On the issue of bankruptcy notice, it is not in dispute that the bankruptcy notice was filed on 4 September 2012 three months before the appointment of the respondent as the administrators for the estate of the deceased. At the date of hearing of the appeal, learned counsel conceded that even though the court has granted order in terms of the application for the respondents to be appointed as administrators the sealed copy of the order had not been extracted as at 28 November 2012, ie the date of hearing of this appeal.

THE SUBMISSION

[10] The submission of the learned counsel for the appellant can be summarised as follows:

(a) even a person who has been granted letters of administration cannot sue or be sued in respect of the estate or its liabilities until the grant has been extracted. This relies on a number of cases to support the proposition, namely: (i) *P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* [1961] 1 MLJ 89; [1961] 1 LNS 78; (ii) *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3; [1968] 1 LNS 7; (iii) *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188; [1997] 4 CLJ 393; (iv) *Chong Ah*

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Guan & Anor v Amanah Merchant Bank Bhd & Ors [1993] MLJU 121; [1993] 1 LNS 17;

(b) only in very limited circumstances can the administrator maintain the action and to do so the burden lies on him to demonstrate special circumstances and the test set out in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 as applied in the instant case by the learned High Court judge is not the correct test for administration proceedings; and

(c) special circumstance in 'administration of estates' here necessarily means the action to preserve and protect the estate of the deceased in question. This relies on a number of cases, namely: (i) *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361; (ii) *Ooi Jim & Anor v Ai Eit & Ors* [1977] 2 MLJ 105; [1974] 1 LNS 108.

[11] Learned counsel for the respondent agrees with the proposition laid out by the appellant and relies heavily on cases which had whittled down the strict rule enunciated in *Ingall v Moran* [1944] KB 160. This also attempts to argue on the facts of the case they have locus standi to pursue with the bankruptcy proceeding notwithstanding the fact in our view:

(a) the issue whether the Court of Appeal has stayed its first orders has not been properly clarified or determined and it is not our function at the present appeal to do so;

(b) whether the stay will also relate to the civil suit as well as the bankruptcy proceeding has also not been properly clarified or determined and it is not our function at the present appeal to do so;

(c) whether in fact the respondent had before getting the bankruptcy notice issued had demonstrated to the court that they have locus standi is also not clear. And for this purpose it would have been most appropriate to obtain leave to commence bankruptcy proceeding by way of originating summons to cloak the administrators with locus standi in reliance of *Al Rashidy* case taking into consideration the strict provision of s 39 of the Probate and Administration Act 1959, as a matter of law vest 'locus standi' to the 'official administrator'.

[12] We have read the appeal records and submissions of the parties in detail. We thank the counsel for the comprehensive submission. After much consideration upon the submission of learned counsel for the respondents, we take the view the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) Malaysian courts have repeatedly given recognition to the rule that an administrator must have the sealed order of the High Court before getting entangled in any legal proceedings in court; and

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(b) quite recently in the case of *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361, the Federal Court in reliance of the Singapore Court of Appeal's decision in *Wong Moy (administrators of the estate of Theng Chee Kim, deceased) v Soo Ah Choy* [1996] 3 SLR 398 had whittled down the strict rule expounded in *Ingall v Moran* [1944] KB 160 and the law set out in s 39 of the Probate and Administrative Act 1959 in exceptional cases where the purported administrator can show special circumstance. The threshold test set out by the Federal Court is high.

[13] In our view, the facts of that case and the present case have no resemblance to attract the 'special circumstances' concept. In *Al Rashidy*, the Federal Court on the facts held:

(1) Special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate; all the circumstances of the case ought to be considered by the court in arriving at a just result (*Wong Moy (administratix of the estate of Theng Chee Khim, (deceased) v Soo Ah Choy*). Also, the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment (*Re Atkinson; Omar Ali Mohd & Ors v Syed Jajaralsadeq Abdulkadir Alhadad & Ors*).

(2) In the present case, the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had, by fraudulent means, transferred the land to himself. The respondent had also entered upon the said land and damaged the fruit trees and demolished buildings found there. Further, the said land was liable to be sold by the respondent to a third party. In that event, the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn Bhd v Boonsom Boonyamit* which conferred immediate indefeasible title to a purchaser in good faith for valuable consideration. The appellants thus had to act fast in order to protect and preserve the deceased's estate. Therefore, on the facts of this case, there existed special circumstances for the beneficiaries to commence legal action against the respondent qua beneficiaries for the purpose of protecting and preserving the assets of the estate. Quite apart from that, the beneficiaries in the present case had at least an equity in the deceased's estate that would entitle them to seek a declaratory judgment. Thus, on the above grounds, the appellants had the locus standi to commence this action at least for the limited purpose of protecting and preserving the estate's assets.

[14] We agree with learned counsel for the appellant, the learned judicial commission was wrong in relying on *Kosma*'s case in the application of the 'special circumstances' concept. The test for administration proceedings for locus standi must be at least for the purpose of protection and preserving the estate's assets. We do not see how instituting a bankruptcy proceeding against a purported debtor of the estate will fall within the restrictive test. In addition, in the instant case the appellant is also claiming a sum of more than what he has

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to return to the estate in consequence of the court order. It may have been different if the appellant as debtor is attempting to dissipate his property to defeat the deceased estate claim. On such facts it may be quite possible to attract the 'special circumstances' concept. A bankruptcy proceeding cannot be said to be for the purpose of protecting and preserving the deceased estates' assets.

[15] In addition, the Bankruptcy Act only gives locus standi to a creditor and not to an administrator who has not extracted the sealed order, unless the issue of locus standi has been condoned by order of court. Bankruptcy proceedings are quasi penal proceedings (see *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32). In consequence, strict letters of the law need to be followed failing which it may breach art 5(1) of the Federal Constitution which reads as follows:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[16] For reasons stated above the appeal is allowed with costs of RM15,000 here and below. The bankruptcy notice is set aside. Deposit is refunded.

[17] We hereby order so.

Appeal allowed with costs of RM15,000 and Bankruptcy notice set aside.

Reported by Ashok Kumar